

IN THE CIRCUIT COURT OF THE
SECOND JUDICIAL CIRCUIT IN AND
FOR LEON COUNTY, FLORIDA

FREDERICK W. KORTUM, JR.,
Plaintiff,

CASE NO.: 2009CA003926

vs.

ALEX SINK, in her capacity as
Chief Financial Officer and head of
the Department of Financial Services
for the State of Florida,
Defendant.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM
OF FACTS AND LAW IN SUPPORT OF THE MOTION

The Plaintiff, Frederick W. Kortum, Jr., having received the Defendant's Answer to his Complaint, hereby moves this court to grant Summary Judgment pursuant to Rule 1.510, Florida Rules of Civil Procedure, and presents a memorandum of facts and law in support of his motion.

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Pursuant to Florida Rule of Civil Procedure 1.510, the Plaintiff moves for summary judgment in this cause and, as grounds therefore, states:

1. There is no genuine issue as to any material fact and the Plaintiff is entitled to judgment as a matter of law.
2. The record includes the verified complaint and the sworn responses to discovery requests from both parties.
3. The essential undisputed facts include the following:
 - A. The Plaintiff is a licensed public adjuster, in good standing with State regulatory

authorities. As a public adjuster, the Plaintiff is subject to a number of restrictions on his activities, but this case challenges only one: the restriction on his ability to engage in truthful commercial speech.

B. The Plaintiff is subject to § 626.854(6), Fla. Stats. (2008), which provides:

A public adjuster may not directly or indirectly through any other person or entity initiate contact or engage in face-to-face or telephonic solicitation or enter into a contract with any insured or claimant under an insurance policy until at least 48 hours after the occurrence of an event that may be the subject of a claim under the insurance policy unless contact is initiated by the insured or claimant.

C. The challenged statute limits the ability of the Plaintiff and other licensed public adjusters to conduct their legitimate business, by limiting their right to engage in truthful commercial speech.

D. Additionally, the challenged statute restricts the reciprocal right of consumers to receive and engage in truthful commercial speech.

E. Since the 48-hour restriction on solicitation took effect on October 1, 2008, the Plaintiff has suffered a loss of income.

F. There are no similar restrictions on contact by insurance company adjusters or by other business people and professionals, such as roofers, cleaning services, or contractors, who also may seek to do business with an insured following an incident giving rise to a claim.

G. There is no substantial evidence that early contact between public adjusters and insured citizens has caused problems that would justify the challenged limitation on truthful commercial speech.

H. The ban on truthful commercial speech emerged from a task force that made the proposal despite the fact that there was no substantial evidence of harm to insured

Floridians solely because they had been contacted by public adjusters in the immediate aftermath of a claim-producing event.

4. Even before filing this lawsuit, the Plaintiff communicated to defense counsel his intention to file for summary judgment, because the Plaintiff believes that the 48-hour ban on truthful commercial speech is unconstitutional. Plaintiff's counsel have provided defense counsel with authorities on which the Plaintiff will rely in the motion for summary judgment. These include a decision on commercial speech rendered by a judge of this circuit earlier in 2009. That decision, *DuCoin v. Viamonte Ros*, 2003CA696 (Fla. 2d Cir. Ct. 2009) is attached.

5. Plaintiff's counsel and defense counsel have cooperated in an orderly discovery process and the Plaintiff has benefitted from an elegant response to his public records requests, allowing the Plaintiff to make a diligent inquiry into the origins of the 48-hour restriction on his truthful commercial speech.

6. However, while the Defendant has graciously and through considerable effort turned over all requested documents, the Defendant has not offered any evidence in support of her contention that the challenged statute serves legitimate State purposes in a constitutional manner. The Defendant's response, instead, has been largely to deny Plaintiff's contentions that were developed in great measure from the Defendant's own documents. Thus, there is no genuine issue as to any material fact, and the Plaintiff is entitled to judgment as a matter of law as outlined in the attached Memorandum of Facts and Law.

7. In this motion, the Plaintiff incorporates by reference the additional references to the record and to the authorities cited in the attached memorandum, including the draft of a forthcoming legislative report on public adjusters.

MEMORANDUM OF FACTS AND LAW IN SUPPORT OF THE MOTION
FOR SUMMARY JUDGMENT

Preliminary Statement

References to the Defendant's Answer to the Plaintiff's Amended Complaint are designated "D-Answer" and followed by the number of the answer, all in parentheses.

References to the Defendant's Responses to Plaintiff's First Request for Admissions are designated "D-Admit" and followed by the number of the response, all in parentheses.

References to the Defendant's Answers to Plaintiff's First Interrogatories are designated "D-Interrog." and followed by the number of the answer, all in parentheses.

Similarly, references to the Complaint are designated "Complaint" and followed by the number of the specific paragraph. References to the Plaintiff's Answers to Defendant's First Request for Admissions are designated "P-Admit" and followed by the number of the answer, all in parentheses; references to the Plaintiff's Answers to Defendant's First Set of Interrogatories are designated "P-Interrog." and followed by the number of the answer; and references to the Plaintiff's Responses to Defendant's First Request for Production of Documents are designated "P-Doc." and followed by the number of the response. All are in parentheses.

I. SYNOPSIS OF FACTS AND ARGUMENT

This action challenges the constitutionality of Section 626.854(6), Florida Statutes (2008), which limits the ability of public insurance adjusters to engage in truthful commercial speech by barring them from soliciting potential clients within the first 48 hours after a storm, fire, or other claim-producing event. The challenged statute provides:

A public adjuster may not directly or indirectly through any other person or entity initiate contact or engage in face-to-face or telephonic solicitation or enter into a contract with any insured or claimant under an insurance policy until at least 48 hours after the occurrence of an event that may be the subject of a claim under the insurance policy unless contact is initiated by the insured or claimant.

The Plaintiff, a licensed Florida public adjuster since 2002, has lost business and been harmed economically as a direct result of the 48-hour ban on solicitation. (Complaint, 5 and 15.) He asks this Court to declare the challenged statute unconstitutional under Article I, Sections 2 and 4 of the Constitution of Florida, and to permanently enjoin the Defendant from enforcing the statute.

The Plaintiff, His Profession, and the Challenged Statute

Frederick W. Kortum, Jr., is a Florida citizen and taxpayer residing in the city of Oviedo in Seminole County. Since 2002, he has been a public insurance adjuster duly licensed under Chapter 626, Florida Statutes. (Complaint, 5.)

He is among the nearly 3,000 licensed public adjusters¹ currently regulated by the Defendant in her official capacity as head of Florida's Department of Financial Services, which oversees all insurance adjusters in the state. *See generally*, §§ 626.851-626.8797, Fla. Stats. (2008).

Public adjusters exclusively represent property insurance policyholders, advocating for fair settlements from insurance companies. In most cases, public adjusters contact and contract with an insured owner or renter only after a claim-producing event, not before. Then they assist with preparing, filing, and adjusting insurance claims. (Complaint, 7.)

Businesses and other commercial interests sometimes have ongoing contracts with public insurance adjusters, but residential policyholders typically hire a public adjuster only after a claim-producing event. *Id.* The percentage of claimants represented by a public adjuster varies with the category of claim. In non-catastrophic claims, for example, approximately 26 percent of

¹ In June 2009, Florida had 2,914 licensed public adjusters. *Source*: Fla. Legis. Off. of Program Policy Analysis & Govt. Accountability (OPPAGA), *Public Adjuster Representation in Citizens Prop. Ins. Corp. Claims . . .*, Draft Rpt. at 2, Dec. 2009.

policyholders with Citizens Property Insurance Corporation (Citizens) retained a public adjuster, while 39 percent of Citizens policyholders involved in catastrophe claims hired a public adjuster. Fla. Legis., Off. of Program Policy Analysis & Govt. Accountability (OPPAGA), *Public Adjuster Representation in Citizens Prop. Ins. Corp. Claims . . .*, Draft Rpt. at 6, Dec. 2009.²

The work of a public adjuster includes assisting in the inventory of lost items, estimating damages, appraising the policyholder's loss, and attempting to negotiate settlements. A public adjuster also may advise clients on policy conditions regarding temporary repairs and protective measures. The variety of responsibilities depends on the individual contract. (Complaint, 7.)

The importance of the public adjuster's advocacy is demonstrated by an article published by the Florida Insurance Council (FIC), reporting that many Florida policyholders are uncertain whether their possessions are fully insured. Fla. Ins. Council, *Poll Finds Confusion Among Insurance Policyholders*, Nov. 19, 2009. Without the timely assistance of a knowledgeable public adjuster in the immediate aftermath of a storm or other event, such policyholders may make decisions that harm their own best interests.

A public adjuster's involvement also frequently increases the dollar amount of a policyholder's final settlement. By some accounts, the average settlement rises by as much as 20 to 50 percent. *See*, Peter C. Beller, *In the Wake of Disaster, Help for Hire*, New York Times (Feb. 2, 2006); and Brian D. Mockenhaupt, *For Public Adjusters, Disaster Means Business*, Providence (R.I.) Journal-Bulletin (Jan. 18, 1998). The Florida Legislature's own program policy analysis office has found that, in claims related to the 2005 hurricanes filed by policyholders of the state-run Citizens Property Insurance Corporation, settlements *averaged 747 percent higher*

² A copy of the report is attached.

for insureds who hired a public adjuster than for insureds who negotiated alone with Citizens. OPPAGA Draft Rpt. at 7.

The same legislative report found a smaller but still significant increase – 574 percent -- in settlements when public adjusters represented Citizens policyholders in non-catastrophe claims. *Id.* at 8. As the report noted, an insured’s net settlement will be lower after paying the public adjuster’s fees. But fees are capped by state law at certain percentages of the insurance claim payments received by their clients. § 626.854(11), Fla. Stats. (2008). Applying the maximum fees allowed by law to the increased average settlements shows that the difference between an insurance company’s initial and final settlement proposals more than covers the public adjuster’s fee.

Although a public adjuster’s involvement may lengthen the time it takes for a claim to be settled,³ the Legislature, through OPPAGA, has found that such claims often are prolonged because public adjusters “may present a larger scope of damages to assess” or because they enter into mediation or appraisal more often than unrepresented claimants. *Id.* at 7.

Thus, the Plaintiff’s profession can be considered consumer advocacy. But many of the statistics used by OPPAGA in demonstrating that public adjusters improve average settlements occurred before the 48-hour ban on solicitation took place. Restricting the Plaintiff’s commercial speech rights not only hurts him economically and professionally, but a policyholder’s reciprocal right to receive such valuable commercial speech -- speech that only a public adjuster can offer -- is also jeopardized by the ban.

³ A public adjuster’s involvement in non-catastrophe claims by Citizens policyholders increased settlement time by a median 74 days, from 41 to 115 total; in catastrophe claims, settlement took between 132 and 296 days longer. OPPAGA Draft Rpt. at 6-7.

To enter the profession, Mr. Kortum successfully completed a course of study at the Andy Beverly Florida Insurance School. (P-Doc., 8.) He also successfully took and passed the State-mandated licensing examination. (D-Admit, 1.)

Since receiving his Florida public adjuster license, the Plaintiff has completed numerous State-approved continuing education classes, as required by § 626.869, Fla. Stats. (2008). (P-Doc., 8.)

Mr. Kortum has further demonstrated his commitment to high standards of practice by joining the Florida Association of Public Insurance Adjusters (FAPIA), a voluntary organization to which less than one-fourth of the State's licensed public adjusters belong. (P-Doc., 3 and 8.) *See also*, FAPIA website, at www.fapia.net.

According to DFS, he has a spotless disciplinary record. (D-Admit, 2.)

The Plaintiff has spent his entire career as a public adjuster working as an independent contractor with Claims Management Service, a public adjusting firm in Maitland, Florida. (P-Doc., 8.) He works primarily with residential rather than commercial policyholders. Although fire losses make up the majority of his claims, he also handles claims resulting from water leaks and from tornadoes, hurricanes, and other storms. (P-Admit, 16.)

Most of his work is in six Central Florida counties -- Orange, Seminole, Osceola, Brevard, Volusia, and Lake -- but he has travelled throughout the state for referrals and for large-scale storm disasters. (P-Interr., 1h.)

For the first six years Mr. Kortum was licensed as a public adjuster, his practice consisted primarily of work with clients he had solicited within the first 48 hours after the claim-producing events that had damaged or destroyed their property. (Complaint, 12.)

But since the time restriction on solicitation took effect on October 1, 2008, the Plaintiff has not attempted to solicit policyholders until after 48 hours have elapsed from the time their property was damaged or destroyed.⁴ (Complaint, 13.) The effect on his business has been dramatic. (Complaint, 15.)

Mr. Kortum does not meet or solicit every policyholder whose loss site he visits, and he does not receive a contract from every policyholder he solicits. However, a detailed log of his work as a public adjuster demonstrates that, during the twelve months before the challenged statute took effect, he visited 158 residential loss sites and signed 15 contracts; but during the twelve months after the ban took effect, he visited 173 residential loss sites and signed only nine contracts. (P-Doc., 7.)

The ban also made it harder for the Plaintiff even to find policyholders to solicit. In the year preceding the ban, he was unable to make contact with any policyholders for 64 out of the 158 residential loss sites he visited. In the year after the ban took effect, he was unable to make any contact for 118 of the 173 residential loss sites he visited. *Id.*

Thus, the challenged statute has taken a measurable toll on Mr. Kortum's business. He has had to make more trips in pursuit of clients, yet meets fewer potential clients, and signs fewer contracts.

But the challenged statute also takes a reciprocal toll on Mr. Kortum's potential clients. The facts demonstrate that, when consumers do not have the services of a public adjuster, their property insurance claims are often settled to their considerable financial disadvantage. The

⁴ Florida Statutes also include a ban on public adjusters soliciting between the hours of 8 p.m. and 8 a.m. or on Sundays. §626.854(5), Fla. Stats. (2008). The combined effect of that prohibition and the challenged statute sometimes results in public adjusters being barred from soliciting for more than 72 hours. However, this lawsuit does not challenge §626.854(5).

Defendant has not shown any facts to demonstrate that the ban is necessary to prevent or cure a pattern of harm to consumers.

The challenged statute emerged from the work of the 2007 Task Force on Citizens Property Insurance Claims Handling & Resolution, which was established by the Legislature to study problems with the state-run insurance company but which produced legislative proposals primarily designed to tighten restrictions on public adjusters.⁵ CS/HB 1A, Engrossed 1/c 2007 Legislature, Regular Session.

However, neither the Task Force nor the Legislature heard testimony or saw any evidence establishing a pattern of misconduct by licensed public adjusters or harm to the public that would have been prevented or cured by a 48-hour ban on solicitation.⁶

During thirteen meetings and workshops, the Task Force heard from numerous policyholders aggrieved with the way Citizens had handled and delayed their claims.⁷ *See generally*, the Task Force website at www.taskforceoncitizensclaimshandling.org. The Task Force also heard from insurance company representatives and public adjusters alike that some public adjusters and other unlicensed persons holding themselves out as public adjusters had

⁵ The Task Force originally proposed a 72-hour ban on soliciting by public adjusters, but the Legislature reduced the ban to 48 hours.

⁶ Official Task Force records and subsequent official legislative reports are generally devoid of support for the 48-hour ban. Therefore, to establish intent, this memorandum will quote from emails sent by Task Force members and staff.

⁷ Sources include audio and videotapes, minutes, slide presentations, and other public records made available on the Task Force website, as well as numerous news reports of the Task Force proceedings.

engaged in unprofessional or fraudulent behavior.⁸ The Task Force also heard testimony that there were “constitutional issues on prohibiting legitimate businesses from soliciting.” Terry Butler testimony to the Task Force, Nov. 16, 2007, Tape 1.⁹ But only one anecdote was given – albeit repeatedly – to justify the ban on soliciting, and it was proffered with few details by Task Force members themselves.

According to the anecdote, a fire in South Florida burned the home of a woman with four children sometime in the week prior to the Task Force meeting of October 5, 2007, and “before the fire vehicles left, there were 19 public adjusters seeking a contract.” Bob Milligan (then Task Force chairman) comment, Oct. 5, 2007, Tape 3.

At various times throughout that meeting, Milligan elaborated on the anecdote:

This is not an exception. It’s worse. . . . The constitutionality and all these other things, we need perhaps to look at, but it’s out of control and we’ve got to get it under control. . . . We’ve heard in public testimony, in telephone calls, in emails, that very often a consumer or policyholder is just inundated . . . almost immediately after an event occurs and they’re under tremendous duress, sometimes even trying to figure out just how to survive.

Milligan comments, Oct. 5, 2007, Tapes 3 and 5.

At the November 16, 2007, meeting, another Task Force member returned to the anecdote to counter DFS staff suggestions that allowing public adjusters to send letters or leave flyers on policyholders’ doorsteps might make the solicitation ban constitutional. “That will deal

⁸ Although some of the bad behavior testified to coincidentally may have occurred during early solicitations, it was not unprofessional or fraudulent based solely on the timing of the solicitation.

⁹ In an earlier email to the Task Force chairman, Butler had speculated that a 72-hour ban on solicitation “may be constitutional because it is limited in time and limited in scope to instances where there has been an occurrence that is likely to result in an insurance claim.” Butler email to Bob Milligan, Oct. 22, 2007.

with the constitutional issues, but that won't stop ambulance chasers where public adjusters show up even before the fire department." Rep. Julio Robaina comment, Nov. 16, 2007, Tape 1.

Even assuming in good faith that the anecdote was rooted in truth, the Plaintiff has searched the files and has not been able to find details supporting the anecdote. Nor did a search of all consumer complaints filed with DFS against public adjusters during the past five years reveal a pattern of complaints about early solicitation. Of the 789 complaints DFS received from January 6, 2004, through early November 2009, only six mention early solicitation, and those references are generally embedded within other complaints.¹⁰

Similarly, legislative staff reports and committee meetings concerning the public adjuster legislation presented no consumer testimony to justify the 48-hour gag on public adjusters. *See*, Fla. H. Staff Analysis for CS/CS/HB 661, 2008 Reg. Sess., Apr. 21, 2008.

Despite the concerns about policyholders having to deal with public adjusters soon after a fire or storm, neither the Task Force nor the Legislature proposed a similar ban on other businesses and professions, such as contractors and cleaning services, whose representatives often solicit policyholders in the immediate aftermath of claim-producing events. (D-Admit., 18.) Similarly, adjusters working for insurance companies remain free to contact policyholders during the first 48 hours.

These unconstitutional inequities mean that Mr. Kortum, other public adjusters, and Florida policyholders have suffered damages as a result of the challenged statute, and will suffer future damages if their constitutional rights to truthful commercial speech are not restored.

¹⁰ The texts of those complaints are attached.

II. ARGUMENT

The challenged statute not only has harmed the Plaintiff, other public adjusters, and Florida consumers, but it cannot withstand scrutiny under the established test for determining whether restrictions on commercial speech are constitutional.

A. APPLYING THE *CENTRAL HUDSON* TEST SHOWS THAT THE 48-HOUR BAN UNCONSTITUTIONALLY CHILLS COMMERCIAL SPEECH RIGHTS.

Florida's obligation to protect freedom of speech extends from two sources: the First Amendment of the United States Constitution as extended to the states under the Due Process Clause of the Fourteenth Amendment, and Article I, Section 4, of the Florida Constitution. *Dept. of Educ. v. Lewis*, 416 So. 2d 455, 461 (Fla. 1982). The scope of state protection for speech rights "is the same as required under the First Amendment." *Café Erotica v. Fla. Dept. of Transp.*, 830 So. 2d 181, 183 (Fla. 1st DCA 2002). In this case, the Plaintiff relies on the protection accorded by the Constitution of Florida.

Lawful commercial speech has received First Amendment protection for more than thirty years, since the United States Supreme Court established that "the free flow of commercial information is indispensable . . . to the proper allocation of resources in a free enterprise system." *Va. St. Bd. of Pharm. v. Va. Citizens Consumer Council*, 425 U.S. 748, 765 (1976).

There, the Court struck down a state law that prohibited price advertising for prescription drugs, finding that commercial speech benefits the potential buyer as well as the seller. Thus, while a pharmacy has a constitutional right to advertise, "there is a reciprocal right to receive the advertising." 425 U.S. at 757. Indeed, some spending decisions are so important that a consumer's interest in receiving commercial information may be "keener by far than his interest in the day's most urgent political debate." *Id.* at 763.

These premises also apply to the situations that Florida public adjusters and their potential clients face in the first 48 hours after a claim-producing event, when policyholders need timely access to information that will help them make intelligent and well-informed decisions about repairing and replacing property, and filing and settling claims.

Barring state-licensed public adjusters from contacting consumers during this critical period, when contractors are free to solicit business and insurers already may be negotiating settlement, violates the commercial speech rights that *Virginia Board of Pharmacy* guarantees.

Florida courts begin their scrutiny of commercial speech limitations with the premise that any restriction is “presumptively unconstitutional.” *N. Fla. Women’s Health & Counseling Servs., Inc., v. State*, 866 So. 2d 612 (Fla. 2003). The courts then examine commercial speech claims under the four-part test established in *Central Hudson Gas & Electric Corporation v. Public Service Commission of New York*, 447 U.S. 557 (1980), which allows government to regulate commercial speech only if it concerns illegal activity, or is false or misleading, or if the regulation directly and narrowly advances a substantial state interest. *See, State v. Bradford*, 787 So. 2d 811 (Fla. 2001), and *Cafe Erotica*, 830 So. 2d 181.

Commercial speech restrictions receive intermediate scrutiny (*Beckwith v. Dept. of Bus. and Prof. Reg., Bd. of Hearing Aid Specialists*, 667 So. 2d 450, 451 (Fla. 1st DCA 1996)), and the State bears the burden of establishing each *Central Hudson* element when a limitation on commercial speech is challenged. *DuCoin*, 2003CA696 at 12. But applying *Central Hudson* to Florida’s 48-hour ban on solicitation by public adjusters shows that the statute has significant infirmities and should be declared unconstitutional and a permanent injunction imposed against its enforcement.

1. Public Adjusting Is Lawful Activity, and Florida Law Prohibits False and Misleading Speech by Public Adjusters.

The threshold concern of *Central Hudson* is that “government may ban forms of communication more likely to deceive the public than to inform it, or commercial speech related to illegal activity.” 477 U.S. 563-64. The challenged statute fails this fundamental test.

Public adjusting has been practiced lawfully in Florida for more than half a century, as demonstrated by a 1958 Florida Supreme Court decision overturning a statute that prohibited members of the profession from all soliciting. *Larson v. Lesser*, 106 So. 2d 188 (Fla. 1958). That court concluded: “[W]e fail to find any reasonable basis whatsoever in the public health, welfare, or safety that justifies the imposition of a restriction which . . . which would have the practical effect of prohibiting the appellee from actually engaging in the business which the Legislature itself recognizes as being perfectly legitimate.” *Id.* at 192.

Similarly, current Florida administrative regulations recognize that “[t]he solicitation of public adjusting business for compensation is deemed to be a material part of the business of public adjusting.” Fla. Admin. Code R. 69B-220.051(3)(a).

Today, nearly 3,000 public adjusters are licensed to practice in the state under provisions of Chapter 626, Florida Statutes. Unlicensed persons may not hold themselves out as public adjusters. *See generally*, § 626.854, Fla. Stats. (2008). Florida laws are considered among the most “long, detailed, and complex” state regulations of the profession. *See*, Bobby Marzine Harges, *Disaster Mediations in Mississippi*, 77 Miss. L.J. 761, 776 (2008). The statutes include numerous safeguards against false and misleading speech by public adjusters, including:

It is an unfair and deceptive trade practice . . . for a public adjuster . . . to circulate or disseminate any advertisement, announcement, or statement containing any assertion, representation, or statement with respect to the business of insurance which is untrue, deceptive, or misleading.

§626.854(8), Fla. Stat. (2008).

Depending on the severity of the offense, a violation of these prohibitions may be an administrative violation, a first-degree misdemeanor, or a third-degree misdemeanor, and may be punished accordingly. § 626.8738, Fla. Stats. (2008). Violators also may lose their licenses. *Id.* Any licensed public adjuster who makes false or misleading statements in the course of practicing this lawful commercial activity faces significant penalties or expulsion from the profession. §§ 626.9521 and 626.9541, Fla. Stats. (2008).

DFS has acknowledged that it is diligent in regulating the profession, yet a forthcoming legislative report establishes that “the incidence of complaints, regulatory actions, and allegations of fraud involving public adjusters is generally low.” OPPAGA Draft Rpt. at 1. Taking into account Florida’s statutes, administrative regulations, and enforcement, sufficient safeguards are in place to assure that there is not a pattern of false or misleading information disseminated by Florida public adjusters, and that any aberrant behavior is investigated and disciplined in a timely and appropriate manner.

As for the Plaintiff, he has scrupulously observed Florida laws and regulations in the practice of his profession. DFS confirms that Mr. Kortum has faced no disciplinary charges or actions during his career as a licensed public adjuster.

Thus, examining the statute both facially and in its effect when applied to Florida public adjusters generally and to the Plaintiff specifically, it is clear that the 48-hour ban does not satisfy the first prong of *Central Hudson*.

2. The Governmental Interest in Muzzling Public Adjusters for 48 Hours Has Not Been Established.

The second element of *Central Hudson* is that “[t]he State must assert a substantial interest to be achieved by restrictions on commercial speech.” 447 U.S. 564. Florida courts

have interpreted the second prong to mean that the State must prove that “the harms it recites are real [and that the] restrictions will in fact alleviate them to a material degree.” *Bradford*, 787 So. 2d at 821, citing *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 626 (1995). However, it is unclear what governmental interest is served by barring public adjusters from soliciting policyholders in the first 48 hours after a claim-producing event.

Public adjusters have been the subject of Florida law for more than half a century. *See, Lesser*, 106 So. 2d 188. The statutes were expanded with proposals from the 2007 Task Force on Citizens Property Insurance Claims Handling and Resolution (the “Task Force”) to the 2008 Florida Legislature.

Although the Task Force was established to examine problems with Citizens, the large state-run insurance company, the Task Force also found that, “while the services of public adjusters can be beneficial to policyholders who have suffered a loss, the current laws do not adequately protect consumers from unscrupulous public adjusters.” *See, Staff Analysis for CS/CS/HB 661*, Florida House of Representatives, Apr. 21, 2008. (Provisions from this bill were folded into the primary legislative vehicle, SB 2012.)

The Legislature subsequently expanded the statutes governing public adjusters so the law contains numerous safeguards against unscrupulous practitioners. In addition to the anti-fraud provisions discussed above, the safeguards include:

- * A licensed public adjuster must pass a written examination, post a \$50,000 surety bond, and complete 24 hours of biennial continuing education.
- Public adjusters may not act as contractors with their clients or have financial interests in contracting or salvaging firms that do business with those clients.
- Public adjusters are subject to a state code of ethics that bars negotiating with claimants or witnesses who are suffering from shock, serious mental or emotional distress, or trauma associated with their loss.

- * Public adjusters are prohibited from giving loans or financial advances to clients or prospective clients, and from giving anything worth more than \$25 as an advertisement or inducement to contract.
- * Public adjusters' fees are capped at 10 percent of for hurricane-related or other public state-of-emergency claims, and at 20 percent for all other claims. The 10-percent cap applies during the first year after a storm.
- Insured individuals and claimants who contract with a public adjuster may cancel their contracts within five business days after signing during a declared state of emergency, and within three business days for non-emergencies.
- Contracting with a public adjuster does not remove a claimant's right to participate in the adjustment of his or her claim.

See generally, §§ 626.851-626.8797, Fla. Stats. (2008).

Among Task Force proposals to the Legislature was a 72-hour ban on solicitation by public adjusters in the aftermath of claim-producing events. The Legislature kept the broad provisions of the ban, but reduced it to 48 hours.

However, as demonstrated by the facts, neither the Task Force nor the Legislature heard testimony or saw any evidence alleging a pattern of misconduct by licensed public adjusters that would have been prevented or cured by a 48-hour ban on solicitation. None of the individual policyholders who testified to the Task Force complained about public adjusters soliciting them too soon after a claim-producing event. Nor does an analysis of consumer complaints to DFS about public adjusters over the past five years demonstrate such a pattern.

If anything, the solicitation ban was generally proposed and endorsed to the Task Force by insurance-company lobbyists, whose own clients frequently are in adversarial relationships with public adjusters. The insurance lobbyists justified a solicitation ban and even argued that it should be longer, by comparing public adjusters to Florida attorneys, who are banned from

soliciting accident victims for 30 days. *See, for example*, Meredith W. Snowden¹¹ e-mail of November 2, 2007, to Vicki Twogood: "Public Adjusters are professionals, and should be treated as such. Attorneys are never permitted to solicit in person, and are only permitted to send written advertisements/ contact to prospective clients after a thirty (30) day waiting period."

The comparison to the time ban on lawyer solicitation¹² is inapt, as demonstrated by a U.S. Supreme Court decision -- often cited by Florida courts -- that overturned a solicitation ban on Florida certified public accountants. The original decision noted "that in-person solicitation, which also included telephonic solicitation, by nonlawyers could not be subject to a prophylactic ban. The Court's conclusion was based on its reasoning that CPAs, unlike lawyers, are not trained in the art of persuasion." *Bradford*, 787 So. 2d at 826, citing *Edenfield v. Fane*, 507 U.S. 761, 774-776 (1993).

Like other nonlawyers, public adjusters do not have training in persuasion equivalent to the training received by attorneys over three years of professional education. A more appropriate comparison would be to the persuasion exercised by company adjusters or contractors and service providers, but whose fitness to approach policyholders immediately was not questioned by the insurance company lobbyists.

Florida House and Senate analyses of legislation imposing the 48-hour ban contained no justification for the restriction. *See*, staff analyses for CS/CS/HB 661 and SB 2012, 2008 Reg. Sess.

Furthermore, DFS cannot produce evidence of a pattern of misconduct by licensed public adjusters that would be prevented or cured by a 48-hour ban on solicitation. Over the past five

¹¹ Ms. Snowden was a consultant on insurance issues for a Tallahassee law firm. *See* web site of Pennington Moore Wilkinson Bell & Dunbar at www.penningtonlawfirm.com.

¹² The ban was upheld by *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618 (1995).

fiscal years, DFS has prosecuted no cases relating to licensed public adjusters based exclusively on complaints that an adjuster was soliciting potential clients within the first 48 hours after a claim-producing event. *Source:* DFS records. OPPAGA's research found that the "incidence of complaints, regulatory actions, and allegations of fraud" against public adjusters is "generally low" and do not reflect a pattern of complaints about early solicitation. OPPAGA Draft Rpt. at 1 and 4.

The Pennsylvania Supreme Court overturned a 24-hour ban on post-disaster solicitation by public adjusters, concluding:

There is no evidence . . . that public adjuster speech within twenty-four hours of a disaster is so pervasively false that contacts within this time frame could generally be characterized as false or deceptive.

Ins. Adjustment Bureau v. The Ins. Commr. for the Cmmw. of Pennsylvania, 542 A. 2d 1317, 1321, FN 5. (Pa. 1988).¹³

Like the U.S. Supreme Court and courts in other states, Florida courts demand substantial proof before allowing a commercial speech gag to stand. In remanding the case of a hearing-aid specialist whose license had been revoked for telephone solicitation of potential clients, the appeals court noted:

We recognize that hearing aid specialists who are precluded from canvassing are thereby denied an opportunity to intimidate, harass, or coerce prospective hearing aid purchasers. But . . . [s]peculation as to *possibilities* [that wrongdoing will occur] is the exclusive basis for the department's contention that *Central Hudson's* second prong is satisfied.

Beckwith at 451-452.

The Defendant in this case cannot demonstrate that early solicitation is an unscrupulous form of public adjusting. Thus, the ban fails the second *Central Hudson* test.

¹³ Plaintiff's counsel supplied this citation, along with others noting the unconstitutionality of commercial speech gags, to Defendant's counsel prior to filing this litigation.

3. The Regulation Does Not Directly Advance the Asserted Government Interest, But Actually Harms the Public.

The third prong of *Central Hudson* provides that any government-imposed restriction on commercial speech “must directly advance the state interest involved [and] cannot be sustained if it provides only ineffective or remote support for the government’s purpose.” 447 U.S. 564. The Defendant has not produced any constitutionally acceptable rationale for how a gag rule on public adjusters directly advances a State interest.

Only one other Florida profession is subject to a period-of-days moratorium on soliciting.¹⁴ As noted earlier, the United States Supreme Court has upheld a ban on lawyers soliciting potential clients for thirty days after an accident or disaster. *Went for It, Inc.*, 515 U.S. 618.

But that decision relied upon “page upon page from complaints” by people who had been solicited by lawyers, to demonstrate that there was reason to restrict such commercial speech. *Id.* at 627.¹⁵ The *Went for It* court also concluded that, during the moratorium period, there were “many other ways for injured Floridians to learn about the availability of legal representation.” *Id.* at 632. Such factors are not present to justify the 48-hour ban on soliciting by public adjusters.

¹⁴ Florida Statutes do bar various professions, including public adjusters, from specific time-of-day soliciting. See § 501.059, Fla. Stats. Funeral directors are barred from so-called “at-need solicitation,” i.e., soliciting family members or next-of-kin after someone has died. §497.381(5), Florida Statutes.

¹⁵ The opinion noted that the Florida Bar had conducted a two-year study specifically about lawyer advertising, and presented the court with a 106-page summary containing “statistical and anecdotal [data].” *Went for It*, 515 U.S. at 626-7.

The restrictions on attorney solicitation survived review by the United States Supreme Court because the Florida Bar had put together a record of problematic attorney solicitations that the Court characterized as “noteworthy for its breadth and detail.” *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 627 (1995).

As the facts in this case demonstrate, the justification offered for a time ban on solicitation was one questionably documented but often repeated anecdote. Florida courts will not defer to legislative statements of fact that “are nothing more than recitations amounting only to conclusions.” *N. Fla. Women’s Health & Counseling Servs.*, 866 So. 2d at 627. Here, the Task Force allegations were essentially that, and cannot carry *Central Hudson’s* third requirement.

As demonstrated above, there is simply no evidence of a pattern of abuses by public adjusters that would be prevented or cured by the 48-hour ban. In fact, the bulk of time-related complaints the Task Force heard about public adjusters were that they became involved *too late* in the claims process – reopening claims on behalf of consumers – rather than that they became involved too early. *See generally*, Task Force records. Similarly, the time-related consumer complaints against public adjusters received by DFS were largely that the claims were not settled fast enough, not that the public adjuster showed up too soon. *See generally*, DFS consumer complaints.

The facts show that the first 48 hours are a critical period for commercial speech, whether for the rights of a public adjuster to seek business or for the rights of an injured consumer to receive information about his or her options. Policyholders often confront extensive damage that requires early decisions in the aftermath of storms, fires, and other events. (P-Admit, 5.)

Those early decisions may have long-term consequences. Important papers, such as insurance policies, mortgages, architectural plans, and receipts for home furnishings may have been destroyed by the disaster. The Task Force received this description of problems that some policyholders experience after a mass disaster:

[W]ith the disruption of electrical power, telecommunications, computer networks, and mail services, the homeowners experience difficulties in communicating and coordinating the damage claim with the insurance company and mortgage lender. Indeed, key documents may be lost or unavailable. . .

Don B. Saxon, Commissioner of the Florida Office of Financial Regulation, from his response to a request for information from Task Force Chairman Bob Milligan. (Saxon's letter and attachments were distributed to Task Force members in a Sept. 6, 2007, email from Task Force Staff Director Vicki Twogood.)

An injured policyholder is rarely left alone to contemplate the problems or work through this maze. The 48-hour ban on public-adjuster soliciting does not prohibit contractors, smoke- and water-mitigation services, and construction workers from soliciting quick business. Similarly, insurance company adjusters are not prohibited from beginning settlement talks immediately.

In fact, materials gathered by the Task Force included the 2007 Catastrophe Claims Guide of Citizens Property Insurance Corporation (Citizens), which states on page 39 that "[i]t is Citizens' goal to contact the policyholder within 24 hours of receipt of assignment." Citizens characterized the so-called "Immediate Contact Rule" as perhaps "the most important principle of successful insurance claims handling." *Id.* at 10.

Task Force staff also contacted three private insurers – State Farm, Allstate, and American Strategic – and reported that: "All three stated that they try to have an adjuster on site within 24 to 48 hours following a loss. . . . They find that being responsive to the homeowner's

needs in the days immediately following the loss, makes the claim less costly in the long run for themselves and insured.” See, Vicki Twogood e-mail of Feb. 18, 2008, to all Task Force members.

The Task Force heard testimony that contractors and service providers also make deals with policyholders as soon as possible after a claim-producing event. Thus, many claim-recovery strategies and decisions are developed within the first 48 hours, when contractors and service-providers are free to solicit and contract with policyholders, and insurance company adjusters are free to negotiate.

The only professional missing from the scene – and from the exchange of commercial information -- is the consumer’s advocate: the public adjuster.

The decision overturning a Florida ban on direct solicitation by certified public accountants made these observations about the benefits of solicitation:

[T]his type of personal solicitation is commercial expression to which the protections of the First Amendment apply [S]olicitation allows direct and spontaneous communication between buyer and seller In particular, with respect to *nonstandard products* . . . these benefits are significant. In denying CPAs and their clients these advantages, Florida’s law threatens societal interests in broad access to complete and accurate information that First Amendment coverage of commercial speech is designed to safeguard.

Edenfield at 766 (emphasis added).

The first 48 hours may be the only opportunity public adjusters have to exercise their commercial speech rights, and the only time an injured policyholder has to exercise his rights to receive valuable commercial speech. Public adjusters in the Pennsylvania case contended that the first 24 hours may be the only time a potential claimant can be located, because many disaster victims move shortly after the immediate aftermath of a disaster, and forwarding

addresses or phone numbers may be difficult to find in a timely way. *Ins. Adjustment Bur.* at 1318.

This is also the case in Florida. The Plaintiff's own business records reflect that the 48-hour ban has made it hard for him to locate people whose homes were damaged by storms, fires, or other occurrences. (Complaint, 14.)

The OPPAGA report demonstrates that, without full and adequate access to consumer-based commercial speech information, such as that which public adjusters provide, policyholders may enter agreements that will result in only partial recovery of their actual damages.

Applying these considerations to the challenged statute strongly suggests that the 48-hour ban may cause more harm than it prevents. The ban fails *Central Hudson's* third test.

4. The Regulation Is More Extensive Than Necessary to Serve the Government Interest.

As its final element, *Central Hudson* establishes that, "if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive." 447 U.S. 564. Florida's public adjusters are governed by a robust system of consumer-protection laws, diligently enforced by DFS; thus, the challenged statute is not a necessary bulwark.

Florida courts have applied the *Central Hudson* test to other state regulatory schemes and found that restrictions on commercial speech cannot be justified by the mere possibility that some fraud may occur without the regulations – especially if less restrictive regulations could achieve the government's objective.

In *Bradford*, the court overturned a chiropractor's conviction for insurance solicitation because the statute under which he was charged prohibited *all* solicitation, whether truthful or fraudulent. ("While the statute. . . may prevent or deter fraud, its criminal net also captures

legitimate and otherwise lawful conduct, the State's semantics notwithstanding." 787 So. 2d at 824.) The Court also concluded that, "[W]e must consider whether there are less restrictive measures which the State may employ in an effort to curtail insurance fraud." *Id.* at 827.

Without a record of abuse by public adjusters that could be prevented or cured by a 48-hour ban, the challenged statute cannot stand. "[T]he First Amendment right to engage in commercial speech may not be so significantly limited on mere speculation that such behavior might *possibly* occur." *Beckwith* at 451-52.

Florida's omnibus 2008 statute and attendant regulations include numerous provisions providing robust consumer protections against unscrupulous and giving claimants time to rethink and cancel contracts. The 48-hour restriction not only is unnecessary to guard against fraud, but it chills commercial speech, violating the constitutional rights of public adjusters and consumers alike.

B. THE CHALLENGED STATUTE VIOLATES THE PLAINTIFF'S RIGHTS TO EQUAL PROTECTION.

Pursuant to the U.S. Constitution's mandate that "[n]o State shall make or enforce any law which shall deny to any person within its jurisdiction the equal protection of the laws," the Florida Constitution establishes equal protection as a basic right. U.S. Const. Amend. XIV; Art. I, §2, Fla. Const. ("It is settled that each of the personal liberties enumerated in the Declaration of Rights of the Florida Constitution is a fundamental right." *State v. J.P.*, 907 So. 2d 1101, 1109 (Fla. 2004).

Therefore, "similarly situated persons are treated alike under the law." *DuCoin*, 2003CA696 at 16. Any statute that distinguishes among such similarly situated persons must be "necessary to promote a compelling governmental interest and must be narrowly tailored to advance that interest." *Westerheide v. State*, 831 So. 2d 93, 110 (Fla. 2002). When a legislative

classification involving fundamental rights is challenged on Equal Protection grounds, Florida courts apply strict scrutiny: The statute is deemed “presumptively unconstitutional” and “the State must prove that [it] furthers a compelling State interest through the least intrusive means.” *N. Fla. Women’s Health and Counseling Svcs.* at 625, n. 16.

The 48-hour ban on solicitation impinges upon the fundamental right of Florida public adjusters to equal protection of laws. Therefore, strict-scrutiny review applies, and will show that the law cannot stand.

As demonstrated, the challenged statute applies only to public insurance adjusters. Similar restrictions are not imposed on other individuals and businesses – including construction workers, contractors, and service providers – that also may contact and contract with policyholders under similar circumstances. Nor are insurance companies and their adjusters restricted from contacting customers during those 48 hours.

Task Force, legislative, and DFS documents offer four possible justifications for this lopsided classification, but none can withstand strict scrutiny.

First, the classification has been justified as a way to protect insurance companies from competition. In an email explaining the ban to Task Force members, Task Force Executive Director Vicki Twogood wrote: “The proposed legislation was made so the company can have an opportunity to meet with the homeowner before they are approached by a PA.” Twogood email to Mike Lancashire *et al*, Sept. 12, 2007. Similarly, the OPPAGA report notes that DFS officials and insurance company representatives claim that 48 hours “is inadequate for insurance companies to prepare and offer policyholders a settlement.” OPPAGA Draft Rpt. at 5.

These rationales can only be described as protectionist – not protective of Florida’s small-c citizens, but protectionist of insurers, including the state-run Citizens insurance

company, which provides approximately one fourth of Florida residential property insurance and is Florida's largest home insurer. *See, e.g.* Florida Sun-Sentinel, *Hot Topics: Citizens Property Ins. Corp.*, available on line at weblogs.sun-sentinel.com. Protecting one commercial interest against competition by another cannot withstand an Equal Protection challenge.

Second, the classification has been characterized as a way of protecting policyholders who "may be emotionally vulnerable, especially after a catastrophic event, and thus unable to make well-informed decisions." OPPAGA Draft Rpt. at 5. Certainly, the State has a considerable interest in protecting such citizens, but the mandatory state public adjuster code of ethics already prohibits negotiating with emotionally vulnerable claimants, and thus provides an appropriate and narrowly tailored restriction on truthful commercial speech.

Furthermore, if potential claimants are so vulnerable that they are incapable of making well-informed decisions in the immediate aftermath of a storm, a constitutionally balanced legislative classification would protect them from the representatives of *all* businesses, not just public adjusters. The situation is similar to one where a court struck down statutory distinctions between for-profit and nonprofit telemarketing:

There is no . . . justification presented . . . in the bald assertion that banning commercial solicitations but not nonprofit solicitations furthers the protection of residential tranquility. Both kinds of telemarketing calls trigger the same ring of the telephone; both kinds of calls invade the home equally, and both risk interrupting the recipient's privacy equally . . . "

Moser v. F.C.C., 826 F. Supp. 360, 366 (D. Or. 1993).

The storm scene is not remarkably more tranquil because one profession, and one profession only, is barred from the premises. And an insured who is unable to make well-informed decisions is even less likely to make them when the only person with a fiduciary duty

to the consumer cannot be on hand to help assess the propositions offered by roofers, cleaning services, and company adjusters.

Third, some emails among Task Force members referred to the solicitation ban as sheltering the policyholder from “forfeiting repair dollars to a PA.” Mike Lancashire email of Sept. 11, 2007. (Similarly, the Task Force Executive Director emailed Task Force members that “PAs are targeting working families who need every penny of their insurance benefits for their families.” Vicki Twogood email to Bob Milligan *et al*, Dec. 6, 2007.)

This justification flies in the face of the facts. While public adjusters charge fees for their services, those fees are capped by state law. Furthermore, the services of a public adjuster typically raise the amount of final settlement by percentages so great that they more than offset the capped fees the public adjuster can charge. OPPAGA Draft Rpt. at 7.

Even if the settlement figures achieved by a public adjuster were not so dramatic, the justification could not support an unequal classification. Every other person on the scene – the contractor, the cleaning specialist, the insurance company adjuster -- affects the consumer’s bottom line, but only the public adjuster is gagged. *Virginia Board of Pharmacy* specifically declined similar “highly paternalistic” justifications for preventing consumers from receiving information that could guide them in how they spend their money. 425 U.S. at 770. And in a case challenging a ban on solicitations by any person for the purpose of making motor vehicle tort claims or claims for personal injury protection benefits, a Florida appellate court noted that:

Every solicitation of business from an accident victim in the context has the potential of being funded by the proceeds of a tort settlement or PIP claim. Persons who are legitimately injured, even those who cannot independently afford treatment, have a right to obtain needed treatment. There is no legitimate basis for not informing an injured person of all available funding sources. The statute is, therefore, not narrowly tailored to only address the state’s interest in preventing insurance fraud.

State v. Cronin, 774 So 2d 871, 876 (Fla. 1st DCA 2000); decision approved by *State v. Cronin*, 801 So. 2d 94 (Fla. 2001).

If the argument cannot uphold the intermediate scrutiny accorded a commercial speech challenge, it certainly cannot withstand the strict scrutiny of an Equal Protection challenge.

The unequal classification was developed as part of the omnibus package of legislation that was described in Task Force and legislative documents as protecting the public from unscrupulous public adjusters. But as the OPPAGA study found, public adjusting in Florida is a generally upright business, (OPPAGA Draft Rpt. at 4), characterized by low numbers of complaints and disciplinary actions. *Id.* at 1. Additionally, the comprehensive legislative scheme contains many narrowly tailored, restrictions on fraud and overreaching. *See*, Chapter 626, Fla. Stats.

Finally, public adjusters with fraudulent intentions may pay no heed to the 48-hour ban, but – even if they did – it would merely delay their misdeeds. The ban is similar to a rule prohibiting Texas bail bondsmen from soliciting potential customers during the first 24 hours after their arrests, which was found not only unconstitutional but ineffective, because “the record [was] devoid of evidence that the twenty-four hour ban will not simply postpone the commencement of harassing behavior until the twenty-fifth hour.” *Pruett v. Harris County Bail Bond Bd.*, 249 S.W. 3d 447, 459-460 (Tex. 2008), citing *Pruett v. Harris County Bail Bond Bd.*, 499 F.3d 403, 415 (5th Cir. Ct. App. 2007).

No defensible basis exists for the disparate treatment of public adjusters under any of these artificial classifications. Therefore, the 48-hour solicitation ban cannot withstand an Equal Protection challenge.

C. THE CHALLENGED STATUTE VIOLATES THE PLAINTIFF'S RIGHT TO BE REWARDED FOR INDUSTRY.

Among the basic rights accorded to Florida citizens is the inalienable right to be rewarded for industry. Art. I, § 2, Fla. Const. Any restriction on this right is subject to strict judicial scrutiny. *De Ayala v. Fla. Farm Bur. Cas. Ins. Co.*, 543 So. 2d 204, 207 (Fla. 1989).

The Florida Supreme Court has noted that: "Inherent in that protection is the right to do business and to contract free from unreasonable government regulation." *Shevin v. Intl. Inventors, Inc.*, 353 So. 2d 89, 93 (Fla. 1977).

More recently, a court in this circuit found that the "end result" of an unreasonable restriction on commercial speech by dental specialists was to deny the plaintiffs their fundamental right to be rewarded for their industry, denying them "some of the benefits that they should receive from their investment of substantial effort and time." *DuCoin*, 2003CA696 at 17. The Final Judgment in that case found that the plaintiffs first had been denied Equal Protection, because other professionals were permitted to engage in commercial speech about similar matters while the plaintiffs were prohibited from such speech. *Id.* at 17-18. Thus, the denial of Equal Protection kept the dental specialists, but no other similarly situated professionals, from enjoying the rewards of their industry.

A similar analysis applies here. The Plaintiff expended his industry in obtaining an education in public insurance adjusting, passing a licensing examination, and continuing to meet the requirements of continuing education and other statutory guidelines. He has been conscientious in observing the requirements of Florida law, even the portion he views as unconstitutionally stifling his rights to engage in truthful commercial speech. All the while, representatives of other businesses and professions are not only enjoying the rewards of industry

very similar or otherwise related to the Plaintiff's industry, but their own rewards may be greater because the Plaintiff is barred from enjoying his.

The Court can restore the Plaintiff's inalienable right to be rewarded for his industry by overturning the challenged statute.

III. CONCLUSION

Section 626.854, Florida Statutes (2008), violates the Plaintiff's rights to lawful commercial speech under both the First Amendment of the United States Constitution and Article I, Section 4, of the Florida Constitution. It further violates the Plaintiff's fundamental rights to Equal Protection under the law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article I, Section 2, of the Florida Constitution. Finally, it interferes with his basic right to be rewarded for his industry, as guaranteed by Article I, Section 2, of the Florida Constitution.

The pleadings, answers to interrogatories, documents, and admissions on file with the court show that there is no genuine issue as to any material fact and that the Plaintiff is entitled to judgment as a matter of law.

Therefore, Plaintiff Frederick W. Kortum, Jr., respectfully moves for summary judgment, and submits that the challenged statute should be declared unconstitutional and enforcement of the statute should be permanently enjoined.

Dated this 15th day of December 2009.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished by hand delivery on this

15th day of December 2009 to:

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